

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 14th day of November, two thousand eight.

PRESENT:

HON. DENNIS JACOBS,
Chief Judge,
HON. JOSEPH M. McLAUGHLIN,
HON. DEBRA ANN LIVINGSTON,
Circuit Judges.

TENZIN CHOEZOM,
Petitioner,

v.

MICHAEL B. MUKASEY,
Respondent.

08-0870-ag
NAC

1 **FOR PETITIONER:** **Gary J. Yerman, New York, New York.**

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3 **FOR RESPONDENT:** **Gregory G. Katsas, Assistant Attorney**
4 **General, Civil Division, Mary Jane**
5 **Candaux, Assistant Director, Achiezer**
6 **Guggenheim, Trial Attorney, Office of**
7 **Immigration Litigation, U.S.**
8 **Department of Justice, Washington,**
9 **D.C.**

10
11 UPON DUE CONSIDERATION of this petition for review of a
12 decision of the Board of Immigration Appeals ("BIA"), it is
13 hereby ORDERED, ADJUDGED, AND DECREED, that the petition for
14 review is GRANTED.

15 Petitioner Tenzin Choezom, a native of Tibet and
16 citizen of the People's Republic of China, seeks review of a
17 January 29, 2008 order of the BIA affirming the June 22,
18 2006 decision of Immigration Judge ("IJ") Robert D. Weisel,
19 denying her application for asylum, withholding of removal,
20 and relief under the Convention Against Torture ("CAT"). In
21 re Tenzin Choezom, No. A98 905 799 (B.I.A. Jan. 29, 2008),
22 aff'g No. A98 905 799 (Immig. Ct. N.Y. City June 22, 2006).
23 We assume the parties' familiarity with the underlying facts
24 and procedural history of this case.

25 Where, as here, the BIA summarily affirms the decision
26 of the IJ without issuing an opinion, see 8 C.F.R.
27 § 1003.1(e)(4), this Court reviews the IJ's decision as the

1 final agency determination. See Twum v. INS, 411 F.3d 54,
2 58 (2d Cir. 2005). We review the agency's factual findings,
3 under the substantial evidence standard. 8 U.S.C.
4 § 1252(b)(4)(B); see, e.g., Manzur v. U.S. Dep't of Homeland
5 Sec., 494 F.3d 281, 289 (2d Cir. 2007). We review de novo
6 questions of law and the application of law to undisputed
7 fact. See Bah v. Mukasey, 529 F.3d 99, 110 (2d Cir. 2008).
8 We will vacate and remand for further proceedings if the
9 agency's reasoning or fact-finding was sufficiently flawed.
10 See Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 406
11 (2d Cir. 2005).

12 In concluding that Choezom had not met her burden of
13 proof to establish a well-founded fear of persecution based
14 on her alleged harboring of a Tibetan political dissident,
15 the IJ: (1) applied an erroneous legal standard for
16 persecution, and (2) mischaracterized the evidence, raising
17 concerns about the completeness and accuracy of his review
18 of the record. These errors require remand to the agency.

19 First, the IJ erred when he concluded that Choezom's
20 husband's detention for harboring the dissident was not
21 persecution (and therefore could not support Choezom's
22 alleged fear of persecution) because "[d]etention by itself

1 without other proof [of] threats, physical violence and
2 gross intimidation can not rise to the level of
3 persecution." See Xu Sheng Gao v. U.S. Att'y Gen., 500 F.3d
4 93, 98 (2d Cir. 2007) ("[T]he arrest and detention of
5 individuals for selling books containing politically
6 disfavored views can constitute persecution on account of
7 political opinion."); Manzur, 494 F.3d at 291 ("If the IJ
8 meant to suggest that a showing of physical harm is always
9 required to demonstrate persecution, this conclusion was
10 error. No such requirement has ever been established.").
11 While we express no opinion as to whether Choezom's
12 husband's treatment amounted to persecution or suggests that
13 Choezom would be persecuted, the IJ's application of an
14 erroneous legal standard warrants remand. See Secaida-
15 Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003), abrogated
16 on other grounds by Xiu Xia Lin v. Mukasey, 534 F.3d 162,
17 167 (2d Cir. 2008) (per curiam).

18 Second, the IJ erred when he stated that the record
19 contained no evidence that Choezom's husband was mistreated
20 beyond his four-month detention and that there was nothing
21 in the record to suggest that Choezom would be persecuted if
22 she returned to Tibet. In explaining his reasoning, the IJ

1 noted that Choezom's letter from her parents in Tibet gave
2 no indication that Choezom's husband had been harmed or
3 mistreated while in custody. Although the IJ referred
4 throughout his decision to a single letter, Choezom's
5 parents actually wrote two letters, both of which were
6 included in the record.

7 In the second letter, Choezom's parents wrote that her
8 husband had been "badly treated" by the Chinese authorities
9 during his detention. They further stated that Chinese
10 officials had not only "questioned" them about Choezom's
11 whereabouts but also physically beat them and that, as a
12 consequence, they were "always scared." In analyzing the
13 evidence, the IJ made no mention of Choezom's parents'
14 claims that Choezom's husband had been "badly treated," or
15 that they had been "physically beaten" by the Chinese
16 authorities.

17 In addition, the IJ reached his conclusion without
18 addressing the background evidence concerning the treatment
19 of Tibetans by the Chinese government that Choezom
20 submitted. Some of this evidence was potentially probative
21 of a well-founded fear of persecution, either because it
22 supported Choezom's claim that she would be singled out

1 based on her allegedly imputed political views or because it
2 was relevant to whether China engaged in a pattern or
3 practice of persecuting Tibetan separatists. See 8 C.F.R.
4 § 208.13(b)(2)(iii)(A).

5 For example, the 2004 State Department Country Report
6 for China suggested that Chinese "[a]uthorities [in Tibet]
7 continued to commit serious human rights abuses, including
8 . . . torture, arbitrary arrest, detention without public
9 trial, and lengthy detention of Tibetans for peacefully
10 expressing their political . . . views." The State
11 Department Report also noted that some Tibetans who had been
12 repatriated "reportedly suffered torture, including electric
13 shocks, exposure to cold, and severe beatings, and were
14 forced to perform heavy physical labor."

15 Although we ordinarily presume that an IJ has taken
16 into account all the evidence before him, the record in this
17 case "compellingly suggests" otherwise. See Xiao Ji Chen v.
18 U.S. Dep't of Justice, 471 F.3d 315, 336 n.17 (2d Cir.
19 2006). Thus, the errors in the IJ's persecution analysis
20 require remand as to Choezom's claims for asylum and
21 withholding of removal. The failure of the IJ to address
22 the background evidence detailing torture of Tibetan

1 political dissidents also requires remand as to Choezom's
2 CAT claim.

3 For the foregoing reasons, the petition for review is
4 GRANTED, the decision of the BIA is VACATED, and the case is
5 REMANDED for further proceedings consistent with this order.
6 As we have completed our review, the pending motion for a
7 stay of removal in this petition is DISMISSED as moot.

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9 FOR THE COURT:
10 Catherine O'Hagan Wolfe, Clerk
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By: _____